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In the Supreme Court of the United States

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Petitioners,

vs.

[redacted]

and

[redacted]

Respondents.

[redacted]

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TABLE OF AUTHORITIES.

Cases.

Continental Oil Co. v. National Labor Relations Board, 113 F. (2d) 473 (C. A. 10, 1940) 4

Dickey, et al. v. National Labor Relations Board, et al., 217 F. (2d) 652 (C. A. 6, 1954) 3-4

National Labor Relations Board v. Harris-Woodson Co., Inc., 179 F. (2d) 720 (C. A. 4, 1950) 4

National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO (1960) 361 U. S. 477 3

Union Carbide & Carbon Corporation v. National Labor Relations Board, 224 F. (2d) 672 (C. A. 6, 1957) 5

Statutes.

Labor-Management Reporting and Disclosure Act of 1959 7

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 73.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128 and 633,

Petitioners,

vs.

LION DRY GOODS, INC.,

and

LASALLE'S DIVISION OF R. H. MACY & CO.,

Respondents.

RESPONDENTS' MEMORANDUM IN RE: APPELLANTS' MOTION TO SUBSTITUTE PARTIES.

The Respondents in their brief filed in this Court suggested that this case might have become moot by reason of the fact that the appellant unions ceased to exist as of December 31, 1959.

This disclosure was made in a note which was a part of the Labor Organization Financial Report filed by each of the appellant unions with the United States Department of Labor on or about the 18th day of March, 1960, Labor Department file numbers 052080, 052082.

This note said:

"As of January 1, 1960 this Local merged with Locals 633 and 954 and District Council No. 6 to form a new Local 954."

The note concerning Local 633 read as follows:

"As of January 1, 1960 this Local merged with Locals 128 and 954 and District Council No. 6 to form a new Local 954."

This same information was contained in the report filed by Local 954 which became Labor Department file number 052081.

We are unable to comment on much of the information contained in the motion of the appellants for lack of information or knowledge. The information contained herein is revealed by a study of the aforementioned reports filed with the Department of Labor, plus the report filed by the new Local, Local 954, on or about March 23, 1961.

Because of the peculiar nature of the litigation before the Court and the unusual fact situation, the right of Local 954 of Retail Clerks International Association, AFL-CIO, to be substituted as the appellant in this case is of critical importance.

We say it is of critical importance because if the Court should rule that the statement of understanding given to the Toledo Labor-Management Citizens Committee by the Respondents here setting forth therein their understanding of the basis on which a strike carried on by the employees of the Lasalle & Koch Company was terminated, created a contractual relationship between both Lasalle's and The Lion Dry Goods Company, Respondents, and the Union to which some of its employees belonged, the Respondent stores will be forced to deal with an entirely new and different entity.

While there are several cases dealing with the obligation of an employer to deal with successor and/or merged unions, those we have been able to study deal with unions previously certified as the bargaining agent for the employees or unions holding contracts with the employers at the time the changes were made.

We have not been able to find any case dealing with a situation parallel to the one involved in this case, i.e.,

where a union which is admittedly not the majority representative of the employees and which admittedly does not claim to represent the majority of the employees, ceases to exist by reason of being merged into a new Local created out of four separate labor organizations.

In *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO* (1960) 361 U. S. 477, the question of substitution of parties was suggested by a motion filed by the Board inasmuch as a new union had been formed by merger of the respondent and another union after the decision of the Court of Appeals. The respondent union also filed a motion asking to be deleted as a party. However, the Court did not make any determination of the legal status of either the predecessor or successor union. In footnote 32 the Court said:

> "In the light of our ruling on the merits, there is little point in determining here and now what the legal status of the predecessor and successor union is, and if the issue ever becomes important, we think that the matter is best decided then."

The *Insurance Agents'* case, *supra*, arose out of tactics used by the union during contract negotiations for a new contract to replace one that was expiring. There, then, the contractual relationship was already in existence.

It would seem that the important point for consideration here is not only whether the entity is changed by the new union which arises out of the merger, but whether the composition of what makes up the new union is different than the two Locals which went out of existence when the new Local was formed.

Various criteria considered important can be gleaned from the relatively few cases we have been able to examine on short notice. For instance, in *Dickey, et al. v.*

National Labor Relations Board, et al., 217 F. (2d) 652 (C. A. 6, 1954) where the Regional Director of the Board substituted one union in place of another union that had filed unfair labor practice charges against the employer, the Court found that the merger resulted in a different organization.

In that case Blacksmiths, the certified union, merged with the Boilermakers, forming a new union. One of the defects found by the Court of Appeals in the attempt to substitute, in addition to the fact that it resulted in a different organization, was that the members of the certified unit constituted only a fraction of the merged group and had no control over it.

This question of merger or change of identity also came up in *Continental Oil Co. v. National Labor Relations Board*, 113 F. (2d) 473 (C. A. 10, 1940). There the Court held that the employer should bargain with the new union because there had been no change in officers; the change was only in name; and continuity of organization was preserved; and that the designations of new names and contracts submitted and other efforts to bargain collectively were made and exerted before the change in name and were therefore in the original name of the union. The change really was a change in affiliation from A. F. of L. to C. I. O.

In *National Labor Relations Board v. Harris-Woodson Co., Inc.*, 179 F. (2d) 720 (C. A. 4, 1950) the question was raised whether the employer was required to bargain with a local union after it changed its affiliation from the C. I. O. to the Textile Workers Union. In doing so it changed its name to United Candy Workers of Lynchburg.

The Court held that the employer should bargain with the union largely on the basis of the findings made by the Board that the change in name and affiliation were of no

consequence. The Board found that continuity of organization had been preserved in view of the fact that the great bulk of the membership was the same before and after the change in name and affiliation and it further found that the officers were the same. The Board concluded that the composition of the union, for purposes of bargaining with the employer, was the same labor organization.

In *Union Carbide & Carbon Corporation v. National Labor Relations Board*, 224 F. (2d) 672 (C. A. 6, 1957), the Court approved the action of the Board in substituting one union for another during an unfair labor practice proceedings against the employer, holding that this was permissible because there were no changes in membership or officers of the Local, or in its day-to-day relationships with the company.

From the reports filed by the various labor organizations out of which the new Local 954 was created, it is apparent that the membership is quite different, so far as it relates to 633 and 128; the organization is new and different in size and structure; the officers are different; the members of 633 and 128 appear to make up only a minor portion of the membership.

In addition to these material changes, historically and factually Local 954, prior to the creation of the new union, was made up of employees of the retail food industry. By this we mean employees of super-markets. Local 633's membership consisted of straight commission sales people employed in department and furniture stores. These people are known in the retail industry as "big ticket" sales people, selling furniture, rugs and major appliances.

The membership of Local 128 was drawn, in the main, from selling and non-selling employees of department and variety stores.

On the basis of the financial reports filed, during the year ending December 31, 1959 dues from the membership of Local 954 amounted to $92,297.35. Dues from the membership of Local 633 during the same period amounted to $4,088.50, while dues from the membership of Local 128 for the same period amounted to $27,667.00.

From these figures, then, it would appear that prior to the formation of the new Local, the combined Locals 633 and 128 were one-third of the strength of Local 954, measured in terms of dues paid by members. We use this measuring stick on the assumption that the total payment of dues accurately reflects the relative membership of the various unions.

For the same period, 1959, the per capita tax paid by each of the Locals reflects the same relative membership. Local 954, for instance, paid $28,691.00 in per capita payments to the International, while the two Locals combined paid slightly over $10,000.00 in per capita payments to the International.

The reliability of these membership figures as deduced from the financial report seems to be borne out by the financial report filed with the Department of Labor by the new Local 954 in March of 1961. The dues collected by Local 954 during the year of 1960 amounted to $126,353.00 which compares with approximately $123,500.00 in membership dues collected by all of the Locals in 1959.

The combined payment of per capita tax by the three Locals in 1959 was relatively the same as paid by the new Local in 1960.

As we have already indicated, these figures are used in trying to arrive at the relative membership strength of the three Locals only because no other information is available to us for that purpose.

The officers of Local 633, one of the appellants here, were:

Clement Walter
Bernard Mehen
Burton Knisley
Paul E. Thielen
Richard P. Mehen.

The officers of Local 128, the other appellant here, were:

Ruth Wright
Irene Tobak
Belle Drake
Thelma Haas
Ada H. Long.

The officers of the new Local 954 are:

Hugh A. Nicholas
Elden T. Leedy
Ada H. Long
Ruth Wright
Gertrude Juergins
Dorothy Smithers.

The appellants suggest in their memorandum that the components of old Locals 633 and 128 are separated into divisions within the new Local 954 and as such, retain their same officers and employees and that each conducts its own affairs. We submit that by reason of the Labor-Management Reporting and Disclosure Act of 1959 such groupings within the Local would be labor organizations as defined in Section 3 of that Act. This would require the separate divisions within Local 954 to file reports with the Secretary of Labor. This is not done and has not been done.

In fact, Local 954 has recently petitioned the National Labor Relations Board asking that it hold a representation

election among the employees of Lasalle's, one of the Respondents herein. The election among the employees has been set for December 21, 1961. That petition was filed by Local 954, not by any subdivision of Local 954 which consists of department store employees only.

The very filing of a representation petition by Local 954 for an election among the employees of Lasalle's, we suggest, makes the suggestion of mootness all the more germane, particularly in view of the peculiar factual situation involved in the only issue before the Court: whether the statement of understanding given by the Respondents to the Toledo Labor-Management Citizens Committee is a Section 301 contract enforceable, if substitution of parties were to be permitted, by Local 954.

Respectfully submitted,

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MERRITT W. GREEN
and
MERRITT W. GREEN II,
Attorneys for Respondents.